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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1982

HARLAND L. RADUE, PETITIONER
v.
UNITED STATES OF AMERICA

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Shall the United States Supreme Court "countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution"?

2. Can the Defendant in a criminal tax case be deprived of the due process right to an adversary hearing for the taking of evidence, which he would enjoy, by analogy, in a civil summons enforcement case?

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In The

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NO. 82-.....

HARLAND L. RADUE, PETITIONER
v.
UNITED STATES OF AMERICA

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, in this case.

REPORT OF OPINION BELOW

The Opinion of the Court of Appeals for the Eleventh Circuit is reported in the Federal Reporter, Second Series as ___ Fed.2d _____. The case is styled UNITED STATES of America, Plaintiff-Appellee v. Harland L. RADUE, Defendant-Appellant. Non-Argument Calendar, No. 82-7124, dated June 16, 1983.

JURISDICTIONAL STATEMENT

1. The date of judgment in the Eleventh Circuit Court of Appeals was June 20th, 1983. Sixty calendar days from June 20th would be August 19th, 1983, the statutory final date for submission of the Certiorari Petition to the Clerk of this Court to allow timely docketing to proceed.

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1), and Article III, Section 2, of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION OF THE UNITED STATES

Amendment Five states in part:

" ... No person shall ... be deprived of life, liberty, or property without due process of law."

Amendment Six states in part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."

UNITED STATES CODE

Title 26, United States Code, Section 7203 (26 U.S.C. 7203), states in pertinent part:

"Willful failure to file return, supply information or pay tax.

> Any person required under this title ... or required by this title or by regulations made under authority thereof to make a return ... , keep any records, or supply any information, who willlfully fails to ... make such return, keep such records, or supply such information, shall, in addition to other penalties provided by law, be guilty of a misdemeanor ... "

Title 26, United States Code, Section 7602 (26 U.S.C. 7602), states in pertinent part:

"... For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax ... or collecting any such

liability, the Secretary is authorized:

> (1) To examine any books, papers, records, or other data which may be material to such inquiry.
> (2) To summon ... any person ... to appear ... and to produce such books, papers, records, or other data ...
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

STATEMENT OF THE CASE

1. The Defendant, Harland L. Radue, was convicted in a jury trial June 3, 1981, in the United States District Court for the Northern District of Alabama, U.S. James H. Reddoch, presiding.

2. Defendant Radue stood accused of failure to file income tax returns for the calendar years 1975 and 1976. He had, in fact, submitted 1040 individual income tax return forms, asserting the Fifth Amendment right against self-incrimination, as to each individual question on the return form.

3. Radue was a committed Christian, and had been, for some years prior to the tax years in

question. During the conduct of a prior "civil" inquisition by agents of the Internal Revenue Service as to Radue's tax status for the years 1969 through 1974, Radue informed the "service" in writing as follows:

> "My Lord and my Saviour's word, the Holy Bible says 'ye are my ministers'. I am one of His, so I am a minister. The funds I handle in Christ's Ministry belong to the Lord and not to me - - They are under my stewardship but not my possession, so they do not belong to me and hence they do not represent personal income or professional income in fact or in law."

Radue presented this document at a meeting with Examination Division personnel. It was entered in the administrative file on December 1, 1978.

4. On April 25, 1983, Dwight T. Baptist, District Director of Internal Revenue, acting through District Counsel, and Attorneys Jerry K. McDermott and Thomas R. Thomas, accused Radue of willful failure to file returns for the years 1975 and 1976, by and through a "final recommendation for criminal prosecution",

asserting "income" of 13,849.14 for 1975, and 9441.87 for 1976.

When Radue appeared on that date, in the District Counsel's Office, by and with Counsel Taylor O'Hearn, and a friend Robert Muncaster, he put the District Counsel on notice of the nature of his Christian healing ministry. At that time, Radue presented another copy of the document, previuosly submitted to the Examination Division. The meeting was adjourned, and District Counsel assured O'Hearn that they would "be in touch".

5. On June 17,1979, District Counsel advised O'Hearn by letter:

> "In response to your letter, dated July 11, 1979, wherein you requested the status of the above-named case, we advise you that the case is still under consideration by our office and you will be notified upon disposition of the case."

6. On December 26, 1979, by letter to Taylor O'Hearn, Esquire, Suite 114, Slattery Building, Shreveport, Louisiana, District Counsel John B. Harper advised:

"This is to inform you that the above

case has been referred to the Department of Justice for its consideration."

7. No information was made available to the Defendant to explain the status of the "Recommendation for Criminal Prosecution" from Dec. 26, 1979, the date of the referral, until April 2, 1981, the date the Indictment was returned and filed with the Clerk of the Court.

8. On April 29, 1981 Radue moved by Counsel for recusal of Judge Hancock. The Motion was summarily denied; but Hancock later assigned the case to Magistrate James Reddoch for all purposes, including Motion "hearing" and jury trial, including final judgment and sentencing.

9. On May 27, 1981, Defendant Radue, acting through Counsel Michael Parham, submitted the following Motions, peading for evidentiary hearing on the merits:

(a) MOTION TO DISMISS FOR DENIAL OF SPEEDY TRIAL AND DEPRIVATION OF DUE PROCESS, with AFFIDAVIT[1], and MEMORANDUM,

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[1] Bound herein as APPENDIX A

(b) MOTION FOR PLENARY HEARING AS TO THE FIFTH AMENDMENT PRIVILEGE, and

(c) MOTION TO SUPPRESS[2].

The Motions were summarily denied on May 28, 1981, without notice, hearing, or any opportunity for meaningful objection, just two days before jury trial commenced.

10. Prior to jury trial the prosecuting attorney made a solemn commitment to Micheal Parham, the Defendant's Counsel, that he would make available for the defense, two witnesses, Dwight T. Baptist, District Director of Internal Revenue, as well as Gary Purvis, Special agent. The testimony of both these witnesses was material to the element of pre-indictment delay, as well as the case in chief, of the defense.

The prosecutor violated the solemn commitment, leaving the Defendant in the postion of having to issue supoenas, and then finding the

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[2] Bound herein as APPENDIX B.

witnesses "unavailable".[3]

11. Jury trial was had on June 1, 1981. After the Jury was excused for the day, the Magistrate held a brief "hearing", at which time Defendant's Counsel was allowed to raise objections to the Court's prior summary denial of Defendant's Motions without opportunity for any evidentiary hearing. At the "hearing", all objetions were likewise, summarily overruled.

12. Jury trial resumed on June 2nd, and in due course Defendant's Counsel raised strenuous objections to the Court's Jury Instructions, especially relating to Ministers and Members of Religious Orders, as they applied to the facts and circumstances entailed in Dr. Radue's factual defense theory, namely, that his entire life and work was a ministry, and not a profession or business.

13. Jury conviction followed, with sentence

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[3] See APPENDIX C and D.

of one year imprisonment and a consecutive one year "probation", imposed by the Magistrate Reddoch. Dr. Radue later entirely rejected the "probation" by letter addressed to the Magistarte and put the Court on notice he was demanding a sentence of imprisonment according to the statute, 26 U.S.C. 7203.

14. The Judgment, dated June 24, 1981, was appealed to the United States District Judge, Clarence Allgood, who received written arguments from counsel for both sides.

15. Judge Allgood filed his Memorandum Opinion and Order Affirming the conviction of Radue, on April 16, 1982.

16. Appeal was duly taken to the Eleventh Circuit Court of Appeals. After the normal course of briefing, the Court solicited, sua sponte, supplementary briefing from the Government on the Speedy Trial issue, and declined to allow the Defendant-Appellant's Counsel to respond out of time.

17. The reported Opinion of the Circuit Court issued June 20, 1983, from which this Appeal is taken, to the United States Supreme Court by Certiorari.

ARGUMENT

I.
LA SALLE v. FIRST NATIONAL BANK

> Shall the United States Supreme Court "countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution"?

In the case of United States v. LaSalle National Bank, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed2d 221 (1977), this Court laid down the law to the Internal Revenue Service and the Justice Department, that they would not "countenance delay" on the part of the I.R.S. in making the "formal" Recommendation for Criminal Prosecution" to the Justice Department in criminal income tax cases.

This court went on to state that the use of the I.R.S. "civil" summons would not be tolerated for criminal discovery purposes, once the "institutional commitment to prosecute" had been made.

Radue charged that the I.R.S. was doing exactly that, illegally exercising criminal discovery prerogatives.

In applying the law of LaSalle to the facts shown in the Defendant Radue's case, let us consider two points, first the "delay", and then the "institutional commitment to prosecute".

DELAY IN SUBMISSION

What does the Record show, in the case of Defendant Radue, to reveal that the Internal Revenue Service, indulged in an intolerable "delay" - the sort expressly forbidden by LaSalle?

The Record shows that the "Final Recommendation for Criminal Prosecution" was shown to Defendant Radue on April 25, 1979. It

also shows that there was a "delay in submitting a recommendation to the Justice Department", from April 25th, until December 26th, 1979.

The Record and a common calendar will show a "delay" approximating eight months, during which time the I.R.S. could, and allegedly did, continue seeking criminal discovery in violation of the Grand Jury prerogative, and this Court's decision in LaSalle.

The "delay" was factually established in the District Court, stated and restated in the Defendant's Briefs on Appeal. Neither Court admitted the delay, and neither Court applied the ruling of this Court respecting the "delay".

INSTITUTIONAL COMMITMENT

Was there an "institutional commitment to make a referral"? One would conclude there was, when the "final" I.R.S. authority, the District Counsel made a "Recommendation" marked "final", and when that "Recommendation" represented a final government showing of probable cause,

preceeding actual prosecution for a crime.

We find then, an affirmative answer to both questions.

Was there a "delay in submitting a recommendation to the Justice Department? Answer: Yes, eight months.

Was there "an institutional commitment to make the referral"? Yes, there was.

Neither Court admitted the "institutional commitment to prosecute" existed, and neither Court applied the ruling of this Court respecting the "institutional commitment".

GATHERING ADDITIONAL EVIDENCE

The final question to be posed is this:

Did the "Service" utilize the delay "to gather additional evidence for the prosecution", in violation of the Court's decision in LaSalle?

First this Court must notice the practical difficulty of answering this question, without a hearing or compulsory process, at the District Court level, when all the evidence necessary for

definitive proof laid in the secret camp of the Defendant's adversary, the Internal Revenue Service.

If you were a Defendant facing the factual burden of satisfying that question solely on the basis of facts available to you, how would you go about it?

Would you move the Court for a hearing? Radue did.

Accompanying his MOTION TO DISMISS FOR DENIAL OF SPEEDY TRIAL AND DEPRIVATION OF DUE PROCESS[4], by MEMORANDUM, he pleaded:

> "The intentional delay on the part of the government is self-evident from the showing already made to this Court, and, further proof can be made available by order of the Court for an Evidentiary Hearing, if necessary.

Would you complain to the Court that the delay, occasioned by the Internal Revenue Service, and compounded by the delays of "Justice", constituted a violation of your

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[4] Bound herein as APPENDIX A.

rights? Radue did.

In the same MOTION, he charged:

> "... the aggravated time lapse between the accusation (i.e. recommendation for prosecution) and Trial Date prima facie violates Defendant's constitutional rights to due process ..."

Would not those due process rights encompass the right to be free from prosecutorial abuse of the Grand Jury discovery prerogatives, which were artfully described in LaSalle?

In attempting to carry the burden of showing probable cause to establish that the I.R.S. was carrying out forbidden discovery; would Radue be expected to complain to the Court that the I.R.S. had available to it those forbidden discovery prerogatives during the period of the deliberate "delay"?

In that same MOTION TO DISMISS, Radue charged:

> "... the prosecution has, since the date of accusation (i.e. recommendation for prosecution) continually enjoyed the availability of criminal discovery prerogatives and case preparation, which have been systematically denied to the

Defendant ..."

Would you argue to the Court that the "investigatory" stage ended once the "Recommendation" was made "Final" on April 25, 1979, and that the "criminal discovery "stage then commenced? Radue did.

In his MEMORANDUM attached to the MOTION TO DISMISS he showed:

"It is abundantly clear that the legitimate I.R.S. Administrative Agency's investigatory functions terminated conclusively on April 25, 1979, with their "Recommendation for Criminal Prosecution".

"It is also clear that a criminal prosecution discovery phase of operations commenced on or after that date, with or without Justice Department conspiracy or collaboration."

Would you submit an affidavit, suitable to trigger a hearing? Radue did, and he stated in his MEMORANDUM:

> "The actual prejudice to the conduct of the defense has been laid out in part, by and with the AFFIDAVIT OF HARLAND L. RADUE, attached.

The AFFIDAVIT[5] factually showed three critical elements necessary for dismissal, according to LaSalle:

(1) The date of the institutional commitment to prosecute, namely the "Final Recommendation for Criminal Prosecution",

(2) That the "Recommendation" was "Final", as representing a commitment to prosecute.

(3) That, based on knowledge and belief, the government was unlawfully seeking criminal discovery in the "delay" period.

The first and second elements, (1) and (2), were fairly established as a matter of fact, by the following language, appearing in Paragraph 2 of the AFFIDAVIT:[6]

> "2. On April 25, 1979 Dwight T. Baptist, District Director of Internal Revenue for Alabama, acting through I.R.S. District Counsel, accused me of a crime, to wit: Willful failure to make an income tax return for the calendar years 1975 and 1976 ... The accusation was written and dated,

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[5] Bound herein as APPENDIX A.
[6] APPENDIX A.

bearing the name style "Final Recommendation for Criminal Prosecution".

The District Court took no notice of the existence of these facts, and the Court of Appeals, likewise ignored them, taking no heed of their applicability to the LaSalle doctrine invoked by the Defendant.

Respecting the third element necessary to show violation of the LaSalle ruling, the Defendant availed himself of the most powerful means available to him, when he testifed, under oath, based on knowldege and belief, as follows[7]:

> "4. Based on my knowledge and belief, I state that the Government has used this intervening period for purposes of seeking criminal discovery against me in violation of the prerogatives of the Grand Jury - a practice expressly condemned by the US Supreme Court in the case of U.S. v LaSalle National Bank, 437 U.S. 298.
>
> "5. The Government's actions systematically deprived me of equal legal standing to seek out criminal discovery under color of law in timely fashion, while my witnesses health was good and their recollection fresh.

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[7] AFFIDAVIT, par.4,5, APPENDIX A.

Radue had expected his counsel, Taylor O'Hearn, to testify on the matter of unconscionable "delay" by the I.R.S. at a proper evidentiary hearing, but the health of his witness forbid it. The matter was mooted on that account by the Magistrate's stubborn refusal to allow any hearing, or the taking of any evidence.

Prior to jury trial the prosecuting attorney made a solemn commitment to Micheal Parham, the Defendant's Counsel, that he would make available for the defense, two witnesses, Dwight T. Baptist, District Director of Internal Revenue, as well as Gary Purvis, Special agent. The testimony of both these witnesses was material to the element of pre-indictment delay, as well as the case in chief, of the defense.

The prosecutor violated the solemn commitment, leaving the Defendant in the postion of having to issue supoenas, and then finding the

witnesses "unavailable".[8]

The District Court, and The Eleventh Circuit Court of Appeals, have seen fit to "countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution".

This Court may notice that THE MEANS USED TO COUNTENANCE DELAY ARE THE DEPRIVATION OF A LIMITED ADVERSARY HEARING. a matter covered in the ARGUMENT directly following.

The actions of the Courts below, which have "countenanced delay", are in direct violation of the ruling of this Court set out in United States v. LaSalle National Bank. Pursuant to the supervisory power of this Court, it is mandatory that jurisdiction be taken by Writ of Certiorari to examine this important question of first

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[8] See APPENDIX C and D.

impression.

II.

THE RIGHT TO BE HEARD

> 2. Can the Defendant in a criminal tax case be deprived of the due process right to an limited adversary hearing for the taking of evidence, which he would enjoy, by analogy, in a civil summons enforcement case?

The Magistrate in the District Court summarily disposed of the Defendant's pretrial Motions without benefit of any hearing, or any pretrial opportunity to contest the refusal of a hearing.

The Court of Appeals found no fault with the Magistrate's actions, stating in the published Opinion United States v Radue _ _F2d_____ @ 3454:

> "Accordingly we find no error in the magistrate's decision to not hold an evidentiary hearing in this issue".[9], and @ 3455:
>
> "... we conclude that the Magistrate's conclusion that the delay did not violate

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[9] Sixth Amendment Speedy Trial.

appellant's due process rights was correct and his decision declining to hold a hearing on this issue was proper."[10], and @ 3456:

"In light of these facts, the denial of the requested hearing and the motion to suppress[11] are without merit."

The Eleventh Circuit Court of Appeals stated in its Opinion @ 3454:

"It is well established that pre-accusation delay may violate the due process guarantee of the fifth amendment if two factors can be shown: (1) the defendant incurred substantial prejudice as a result of the delay, and (2) the government intentionally delayed to gain an advantage. See United States v. Marion, 404 U.S. 307, 322-325, 92 S.Ct. 455, 464-466, 30 L.Ed.2d 468 (1971); United States v. Durnin, 632 F.2d 1297 (5th Cir. 1980).

"Appellant has pointed to no specific facts or evidence to support his claim of intentional government delay...

" ... he makes no proffer ... that this resulted from the government's intention to gain an advantage.

"Because appellant has not met either requirement necessary to demonstrate a due process violation, we conclude that ... the delay did not violate appellant's due

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[10] Fifth Amendment Pre-Acusation delay.
[11] Criminal discovery use of }7602 summons

process rights ..."

The Petitioner has previously shown herein the Record wherein by Factual AFFIDAVIT[12], and by MOTION and MEMORANDUM, he attcked the good faith of the I.R.S. and the government, charging them bluntly with USING THE DELAY FOR THE SPECIFIC PURPOSE OF CRIMINAL DISCOVERY.

What better "proffer" could the Defendant make than the following language, which is in the Record?

> "4. Based on my knowledge and belief, I state that the Government has used this intervening period for purposes of seeking criminal discovery against me in violation of the prerogatives of the Grand Jury - a practice expressly condemned by the U.S. Supreme Court in the case of U.S. v. LaSalle National Bank, 437 U.S. 298. (1978)."

Having done so, it was beyond Radue's power to force the Court to allow him to make any further factual showing, which by necessity would have to come from the lips of his adversary.

The United States Attorney solemnly agreed to

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12 APPENDIX A, herein bound.

have the District Director, Dwight T. Baptist, and Special Agent Gary Purvis available at the trial for the Defendant's use. The United States Attorney welshed on the commitment[13] at the last minute, when it was too late to compel them to attend by subpoena. The Defendant expected to interrogate these hostile witnesses on the matter of "delay" to carry his factual burden to show bad faith.

It was the actions of the Magistrate and the Prosecution combined, which deprived the Defendant of a chance to carry his burden. The hearing was denied, it's denial was protested. There is nothing in the Fifth Amendment guarantee of due process which commands the Defendant to accept the "right to proffer" in lieu of the right to be heard.

The Petitioner will show the Court that the right to a "hearing" is secured in summons

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[13] See APPENDIX C and D.

enforcement cases, to prove bad faith on the part of the government. He will ask this Court: How could he, as a criminal defendant, be entitled to any less?

The Petitioner will now refer to the case of United States v. Southeast First National Bank of Miami Springs, 665 F.2d.661 (C.A. 5, 1981), to show by analogy that he was entitled to be heard in open court, with a showing of fact from the witness stand, to examine the institutional officials on the bad faith.

This Court will notice that Defendant Radue definitely raised the subject of I.R.S. bad faith into controversy in his criminal case in District Court[14], in exactly the manner that Intervenor - Appellant O'Donnell raised the identical subject matter into controversy before the District Court[15] in a civil controversy.

The Court will also notice that both the

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[14] Northern District of Alabama
[15] Southern District of Florida

civil case and the criminal case come from the same Circuit, inasmuch as the State of Florida is now in the Eleventh Circuit, when it was formerly in the Fifth Circuit.

In the Southeast First National case, supra, the Circuit Court stated @ ____:

> "We decide, infra, that a taxpayer is not always entitled to discoverybefore the sumons enforcment hearing. Therefore it is appropriate to allow the adversary hearing even though the taxpayer has only alleged, without providing a supporting factual background, that the summons was issued for an improper prupose. Otherwise the taxpayer would be placed in the unfair dilemma of having to provide supporting facts, but having no way to obtain those facts. United States v. Harris, supra, 629 F.2d at 880 n.6 (Emphasis added).
>
> "In this brief aside, Judge Simpson has clearly delineated the flaw in the IRS' present argument that the taxpayer was not entitled to an adversary hearing because he never factually supported his allegations of bad faith. The Supreme Couirt has imposed a heavy burden in taxpayer's to establish that the IRS, "in an institutional sense', has abandoned the pursuit of a civil tax collection. United States v. La Salle National Bank, supra, 437 U.S. at 318, 98 S.Ct. at 2368. ...
>
> "For these reasons of practicality and fairness, we hold that an allegation of improper purpose is sufficient to trigger a

> limited adversary hearing where the taxpayer may question IRS officials[16] concerning the Service's reasons for issuing the summons. ...
>
> "We therefore hold that ... the district court ... may not refuse a limited enforcement hearing when to do so would deny taxpayer his sole means of demonstrating the truth (or falsity) of his allegations.

If the civil litigant O'Donnell was entitled to a "limited adversary hearing" with the right to interrogate IRS officials, including the Regional Counsel, how then could the Defendant in a criminal case, subjected to a prison term of two years and a fine of $_____, be entitled to any less?

We see then that the Defendant Radue was deprived of equal protection of the law, by the actions of the Eleventh Circuit Court, which

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[16] Footnote 5, in the case states: "LaSalle emphasized that the intent of the individual agent is no longer dispositive in establishing the institutional posture of the IRS. ... Any information not within the knowledge of the agent must be supplied by a staff member of the Regional Counsel's Office or by some other individual who is authorized..."

applied one kind of protection in a civil case, and a lesser standard of protection for a different citizen in a criminal case, where the criminal defendant had far more at stake.

The deprivation of due process argument is not solely dependant on the case above cited. The phrase "due process of law", by definition includes notice and a "hearing" before judgment issues. The Defendant was deprived of a "hearing" as a part of a "trial" on the law, by the actions of the Courts below.

These important constitutional protections cannot rightfully be denied to the Defendant Radue. This Court will therefore be constrained to accept supervisory jurisdiction to guarantee that the application of constitutional protections will be identical in both civil and criminal cases in the Eleventh Circuit.

CONCLUSION

For the reasons shown hereinabove, and in the

interests of justice and judicial economy, Petitioner moves the Court to issue its Writ of Certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted, on behalf of Harland L. Radue.

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AFFIDAVIT OF SERVICE

I certify that, in addition to service of forty (40) copies on the Clerk of the U.S. Supreme Court, service of three (3) copies of this PETITION FOR WRIT IF CERTIORARI was today had upon:

The Solicitor General of the United States
Department of Justice
Washington, D.C. 20530.

Service was also had on this date of one (1) copy of the same upon:

U.S. Attorney, Northern District of Alabama
U.S. Courthouse
Birmingham, Alabama.

All copies were served by mailing through the U.S. Postal Service, postage prepaid, by First Class Mail, Return Receipt Requested, from _____.

_____
Member of the Bar of the U.S. Supreme Court.

Subscribed and affirmed to,
before me this ... day of August, 1983

.....
Notary Public

My Commission expires.....

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, :

V. : CR 81-H-00080-S

HARLAND L. RADUE :

AFFIDAVIT OF HARLAND L. RADUE

Comes now the Defendant, Harland L. Radue, first, being duly sworn, to depose and say as follows:

1. My name is Harland L. Radue, Defendant in the above styled and numbered case.

2. On April 25, 1979 Dwight T. Baptist, District Director of Internal Revenue for Alabama, acting through I.R.S. District Counsel, accused me of a crime to wit: Willful failure to make an Income Tax Return for the calendar years 1975 and 1976, from which a tax liability could be computed, within the time required by law. The accusation was written and dated, bearing the

name styled "Final Recommendation for Criminal Prosecution". On this occasion I was accompanied by Taylor O'Hearn, my counsel, and Robert Muncaster, my Christian Brother and friend.

My clearly stated position, which constituted a plea of "Not Guilty" to the accusation was, in substance, as follows:

> "All funds stated by your Special Agents to represent personal or professional income to me do not represent either gross income or gross receipts inuring to my benefit. The monies accrued belong to God and Him alone; I am His Steward and my work is God's ministry to glorify the name of Jesus Christ, my Lord and Saviour.
>
> "I do not pretend to have any license from the I.R.S. or any Government (agency) to do God's work. My authority comes direct from Jesus Christ and Him, alone."

My counsel then presented a copy of a written Declaration to the same effect, which had been presented to the IRS Examination Division and the District Director, on or about December 1, 1978; more than a year before the conference.

2. My counsel and I heard nothing from the IRS concerning this accusation - in spite of

repeated attempts to definitively settle the issue. We arrived at a settled conviction that the prosecution idea had been abandoned.

3. It was not until April 25, 1981, when I received notice that an Indictment had issued with respect to this Criminal Charge that I realized that I would now be expected to stand trial on the government's accusation, which I believed had been abandoned.

4. Based on my knowledge and belief, I state that the Government has used this intervening period for purposes of seeking criminal discovery against me in violation of the prerogatives of the Grand Jury - a practice expressly condemned by the U.S. Supreme Court in the case of U.S. v. LaSalle National Bank, 437 U.S. 298 (1978).

5. The Government's actions systematically deprived me of equal legal standing to seek out criminal discovery under color of law in timely fashion, while my witnesses health was good and their recollection fresh.

6. The deceptive tactics of the Government as to this Criminal Prosecution have so confused and misled me, that they induced a state of ignorance that I might be called upon to prepare a defense - and hence, I took no actions on my own to seek out discovery, assemble any witness' statements, or document my innocence in any manner.

7. The lapse of time since the Government's initial accusation has seriously compounded my ability to summon witnesses, to wit:

(a) My counsel Taylor O'Hearn has suffered serious heart attacks and has been forbidden to indulge in any stressful situations. I believe it would endanger the life of this Key Witness if he were compelled to travel from Shreveport, Louisiana, to Birmingham to testify in my behalf.

8. My recollection of the time and circumstances has so faded that it makes it difficult to recall exactly which patients my ministry served in the years in question, which

examples of the ministry to them, spiritual, physical or financial, would be most material to my defense, which witnesses could best refute the Government's false interpretation of my state of mind, and impeach the falseness of the conclusions that the Government is determined to have the Jury draw.

9. My own position, principles, motivation, and intent are crystal clear - God knows - but the ability to reach back into history for pertinent facts which go to prove my state of mind is practically destroyed. How can I remember everything that happened on that particular day of the pretended offense as I felt it then? I believe that the delay is deliberate on the Government's part. They know the longer they strain my recall, the more they prejudice my case.

10. I know that before God and the Christian Common Law, laid out as a lively foundation, and pursuant to the spirit of the US CONSTITUTION and

the BILL OF RIGHTS, the Government owed me the duty, and owed the people the bounden duty to speedily proceed by INDICTMENT or CRIMINAL INFORMATION to bring on my case, once the ink was dry on the IRS's "Recommendation for Criminal Prosecution"."

11. Once that accusation was made on April 25, 1979, only trivial formalities stood in the way of a speedy trial and due process of law, to wit:

(a) The District Counsel had a solemn duty to mail the accusation to the Justice Department.

(b) The Justice Department rubberstamps approval, ordering formal accusation.

(c) The U.S. Attorney proceeds by INFORMATION or INDICTMENT.

The Government failed and refused to take those trivial steps.

12. My ability to prepare my case is so prejudicially burdened by the Government's actions that a speedy, fair, and impartial trial

is a practical impossibility - but "with God all things are possible". The grace of God, the Blood of His Son, Jesus Christ and the power of the Holy Ghost will deliver me.

May God have mercy on the souls of those who conspire to destroy His righteousness. "It is better that they have a millstone (hanged) around their neck, and be drowned in the depths of the sea."

My Lord and Saviour, Jesus Christ, commands me to speak the truth. I have done so.

HARLAND L. RADUE

Date:

Sworn to, and subscribed before me
this 27th day of May, 1981.
Gene. E. Bell, Deputy Clerk

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, :

V. : CR 81-H-00080-S

HARLAND L. RADUE :

MOTION TO SUPPRESS

Comes now the Defendant to move the Court to suppress the Evidence obtained by the use of the I.R.S. summons issued to any individuals respecting the alleged "Tax Liability" of Harland L. Radue for calendar years 1975-1975.

For cause Defendant shows the Court that in three specific Northern District of Alabama summons enforcement cases, Nos.. 78-M-13395, (W.R. Burns), H-1337-S (Hazel Moates) and P-1336-S (Marilyn Martens) the government petitions to enforce and supporting affidavits were premised in fraud, stating to wit:

> "That the testimony and documents described ... are relevant and necessary to

complete the investigation of (the) correct tax liabilities of Harland L. Radue.

"That the information contained in said testimony and documents is not in possession of the petitioners."

The I.R.S. petitioners knew full well, then and there, that they already had in their possession, photocopies of cancelled bank checks, written by the summoned patients to Dr. Radue. They also had in their possession and control at the time the summoned patients income tax returns as a second means of verification of payments to Dr. Radue.

The particular perjuries in question were committed by Special Agent James Testasecca and Gary Purvis, aided and abetted by Group Manager John G. Dorsey and Caryl Privett, Assistant United States Attorney for the Northern District of Alabama.

Defendant avers the purpose of the perjury and petition for enforcement was (a) deliberate abuse of court process, solely to secure admissible first party evidence for criminal

prosecution, and not to secure evidence of any "tax Liability".

Defendant further moves the Court to suppress any evidence arising out of any bank summons issued by the Government on grounds that the I.R.S. had abandoned any valid civil purpose of collection of any tax , prior to the summons issuance, in violation of the dicta contained in U.S. v. LaSalle National Bank.

Defendant moves the Court to set down evidentiary hearing and oral argument on or about May 25th to the end that a plenary showing may be made on the issue of suppression and relief may be had by order of this court.

HARLAND L. RADUE, DEFENDANT

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, :

V. : CR 81-H-00080-S

HARLAND L. RADUE :

ADDENDUM TO MOTION FOR A NEW TRIAL

As further grounds for a New Trial, Defendant shows the following:

Defendant was deprived of witnesses Dwight T. Baptist and Gary Purvis by government counsel. An agreement was entered into by counsel for both parties that government counsel would make the above witnesses available for the defense. At the time subpoenas were tendered, government counsel informed the defense that said witnesses were no longer available. An affidavit is attached hereto and incoporated here for all purposes.

Respectfully submitted, s/Michael Parham

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, :

V. : CR 81-H-00080-S

HARLAND L. RADUE :

AFFIDAVIT

Personally appeared before me, the undersigned officer duly authorized to administer oaths in the State of Georgia, Michael G. Parham, who, after first being duly sworn deposes and states as follows:

1. I am Michael G. Parham and I represent Harland L. Radue in this matter.

2. Defense was denied two witnesses, Gary Purvis and Dwight T. Baptist, by the actions of government counsel. ...

Date: June 15, 1981 s/ Michael G. Parham

Sworn to and subscribed before me this
15 day of June, 1981.
s/ Kathy Patrick, Notary Public

APPENDIX "E"

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-7124

Non-Argument Calendar

D.C. Docket No. CR-81-H-0080-S

UNITED STATES OF AMERICA,

versus

HARLAND L. RADUE

Defendant-Appellant.

- - - - - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - - - - - - -

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States

District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

June 16, 1983

APPENDIX "F"

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-7124

Non-Argument Calendar

D.C. Docket No. CR-81-H-0080-S

UNITED STATES OF AMERICA,

versus

HARLAND L. RADUE

Defendant-Appellant.

- - - - - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - - - - - - - - - - - - -

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

OPINION

PER CURIAM:

On April 2, 1981, appellant Harland Radue was indicted of two counts of failure to file an income tax return in violation of 26 U.S.C. §7203. Having consented to be tried by a United States Magistrate, appellant's case went before a jury where he was found guilty as charged. Appellant appealed to the district court where his conviction was affirmed on April 15, 1982. Appellant subsequently filed this appeal.

FACTS

For the years 1975 and 1976, appellant failed to file a valid U.S. tax return. During this time appellant was engaged in the practice of chiropractic medicine. In addition to rendering his professional services, the appellant also offered what he considered to be a Christian "ministry" to his patients. This included offering spiritual counsel and material assistance to those people and projects he deemed worthy, including substantial contributions to his church.

During 1975-76, appellant did not maintain a checking account in his own name, but rather, he deposited checks, given to him as payment for his chiropractic services, into his wife's checking account. For 1975, a total $13,031.80 in checks were deposited into his wife's account. In 1976, a total of $17,782.96 was deposited into his wife's account. For those two years the appellant submitted returns which contained no financial information. Each line on the return simply asserted the appellant's fourth and fifth amendment privileges.

Although several meetings were held between the appellant and IRS agents, no agreement was reached. Accordingly, the IRS issued a "Final Recommendation for Criminal Prosecution" on April 25, 1979. Approximately two years later, on April 2, 1981, an indictment issued charging the appellant with failure to file valid tax returns for 1975 and 1976.

I. Issues on Appeal

(a) Pre-indictment delay

Appellant assigns error to the magistrate's refusal to hold an evidentiary hearing regarding appellant's claims of violation of his sixth amendment guarantee for a Speedy Trial and his fifth amendment due process rights. Appellant bases these violations on the pre-indictment delay between the April 1979, Final Recommendation for Prosecution and the April 1981, indictment.

Appellant asserts that the IRS' Final Recommendation for Criminal Prosecution constitutes a formal accusation, thereby activating the time requirement of the Speedy Trial guarantee. Generally, a defendant's right to a speedy trial begins to run at the time of arrest or indictment. **United States v. MacDonald**, 456 U.S. 1, 102 S.Ct.1497, 1501, 71 L.Ed.2d 696 (1982); **United States v. Marion**, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L.ed.2d 468 (1971). The question presented is whether an

agency's recommendation to prosecute activates the speedy trial guarantee. Appellant relies on **United States v. LaSalle National Bank**, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1977) as support for his proposition that a final recommendation is the equivalent of an accusation. **LaSalle** does state that "[a] referral to the Justice Department [for prosecution] permits criminal litigation to proceed." **Id.** at 312, 98 S.Ct. at 2365. This statement, however, does not imply that criminal litigation **must** proceed upon a referral, rather, the Justice Department investigates the case once it has been referred and then decides whether prosecution is appropriate. Until an indictment, information or arrest has occurred, there is no speedy trial requirement. **United States v. Hendricks**, 661 F.2d 38 (5th Cir.1981). Accordingly, we find no error in the magistrate's decision to not hold an evidentiary hearing on this issue.

Appellant argues, in the alternative, that even if the Speedy Trial Act was inapplicable, his fifth amendment due process rights were violated due to the pre-indictment delay. It is well established that **pre-accusation** delay may violate the due process guarantee of the fifth amendment if two factors can be shown: (1) the defendant incurred substantial prejudice as a result of the delay, and (2) the government intentionally delayed in order to gain a tactical advantage. **See United States v. Marion** 404 U.S. 307, 322-325, 92 S.Ct. 455, 464-466, 30 L.Ed 2d. 468 (1971); **United States v. Durnin**, 632 F.2d 1297 (5th Cir. 1980).

Appellant has pointed to no specific facts or evidence to support his claim of intentional government delay. "Speculative allegations, such as general allegation of loss of witnesses and failure of memories, are insufficient to demonstrate the actual prejudice required by **Marion**". **United States v Butts**, 524 F.2d. 975,

977 (5th Cir.1957 citing **United States v. McGough**, 510 F.2d 598, 604 (5th Cir.1975). Appellant does argue that the attorney who represented him during the period covered by the indictment was unable to attend the trial. However, he makes no proffer as to what purpose the attorney's testimony would have served, whether such testimony would have substantially contributed to appellant's defense, or that this resulted from government intention to gain an advantage. Because appellant has not met either requirement necessary to demonstrate a due process violation, we conclude that the magistrate's conclusion that the delay did not violate appellant's due process rights was correct and his decision declining to hold a hearing on this issue was proper.

(b)

Appellant assigns error to the magistrate's refusal to hold an evidentiary hearing to further investigate the allegations he made in a

pre-trial motion to suppress the evidence. Appellant asserted, in his motion to suppress, that the government had improperly gathered evidence through the use of the {7602 summons. Section 7602 of the Internal Revenue Code authorizes the IRS to summon a taxpayer or third party to testify and produce documents which are relevant to an inquiry concerning civil tax liability. In **United States v. LaSalle National Bank**, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1977), the Supreme Court held that a {7602 summons may not be utilized for the sole purpose of gathering evidence for a criminal prosecution. **Id.** at 316 n 18, 98 S.Ct. at 2367 n.18 and accompanying text; **Donaldson v. United States** 400 U.S. 517, 533, 91 S.Ct. 534, 543, 27 L.Ed2d 580 (1971); **United States v. Southeast First National Bank**, 655 F.2d. 661,664 (5th Cir.1981). To ensure that the summons is not used to gather evidence for a criminal prosecution, a {7602 summons may not be issued following a

recommendation to the Justice Department to prosecute. **Donaldson**, 400 U.S. at 536, 91 S.Ct. at 545; see also **LaSalle**, 437 U.S. at 313-17, 98 S.Ct. at 2366-2368.

Appellant contends these summonses were used by the IRS to gather evidence for criminal prosecution after the agency made its recommendation of prosecution to the Justice Department. Initially, we note that an evidentiary hearing to investigate whether the IRS has improperly issued a {7602 summons is appropriate. **See United States v. Southeast First National Bank of Miami** (sic), 655 F.2d 661, 665 (11Cir. Unit B 1981). This hearing, however is usually held at the time the summons is issued at an enforcement hearing or hearing on a motion to quash the summons. Appellant waited until a pre-trial motion to raise any allegation of wrongdoing on the part of the IRS. Although there may be occasions when a pre-trial hearing on the propriety of a {7602 summons would be

appropriate, we conclude no hearing was necessary in this instance. Any error in the magistrate's decision not to hold an evidentiary hearing was harmless at best. **See Chapman v. California**, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); **United States v. Lay**, 644 F.2d 1087, 1090-91 (5th Cir.); **cert. denied**, 454 U.S. 869, 102 S.Ct. 336, 70 L.Ed.2 172 (1981); see also Fed.R.Crim.P. 52(a).

We do not need to address the magistrate's denial of the motion to suppress for the following reasons. First, the record and transcript fails to indicate that any evidence obtained from the alleged improper use of the summons was introduced at trial. The appellant cites no examples of such evidence in his briefs to this court. Moreover, after carefully reviewing the record and transcript, we were unable to discern any instance where the appellant objected to either an exhibit or any testimony by the government witnesses on the

ground that the evidence being offered was obtained through the use of an improperly issued § 7602 summons. Second, although appellant argues his notion to suppress should have been granted in his brief to this court, in his brief to the district court appellant stated: "matters raised by the motion to suppress were later waived by the counsel for the defendant by entry into a factual stipulation as to [the] financial gross receipts ..., of Dr. Radue." Brief of Appellant at 3.

In light of these facts, the denial of the requested hearing and the motion to suppress are without merit.

(c) Remaining issues

Appellant also attacks the magistrate's denial of a hearing to determine the propriety of his assertion of a fifth amendment right against self-incrimination. This issue arose as a result of appellant's submitting tax returns for the years in question in which he asserted, on every

available blank space, that he refused to submit any requested information on the basis of the fourth and fifth amendments. Such a blanket assertion of the privilege against self-incrimination is not justifiable under the fifth amendment. **United States v. Pilcher**, 672 F.2d 875, 877 (11th Cir.1982); **United States v. Booher**, 641 F.2d 218, 219 (5th Cir.1981). The magistrate properly refused to grant a hearing on this issue.

The remaining issues asserted by the appellant are without merit. Having found no error, we AFFIRM.

JUNE 16, 1983.